IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No 1132 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

NATHALAL KALIDAS KHARVA KOTIYA

Versus

STATE OF GUJARAT

Appearance:

MR GONDALIA FOR YOGESH S LAKHANI for Petitioner

MR J.C.GOHEL,ADDL.PUBLIC PROSECUTOR for Respondent No. 1

CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: 09/02/99

ORAL JUDGEMENT

The prayer of the petitioner in this writ petition under Article 226 of the Constitution of India is to quash the show cause notice,Annexure 'A', dated 23/6/1998 issued under section 59 (1) of the Bombay Police Act and further to quash the externment order , Annexure 'B' passed by the externing authority on 29.8.1998 and further to quash the order of the appellate authority, Annexure 'C',dated

16.11.1998.

The brief facts giving rise to this petition are as under :

The externing authority considering registration of three criminal cases against the petitioner under various sections of the IPC and further considering the statements of two confidential witnesses , issued the impugned show cause notice calling upon the petitioner to show cause why he should not be externed from Junagadh district as well as the adjoining districts of Rajkot, Amreli and Porbandar. The petitioner appeared and filed a reply to the show cause notice . He also examined five witnesses and filed 21 certificates to prove his good character. Considering the material on record, the impugned order was passed by the externing authority externing the petitioner for a period of two years from the aforesaid four districts. The petitioner preferred an appeal against the order of externing authority which was dismissed . Hence , this petition.

The impugned orders and the show cause notice have been challenged by the learned counsel for the petitioner on several grounds.

The first contention has been that the statements of the confidential witnesses are vague and even the gist of the incident narrated by the witnesses is not disclosed in the show cause notice nor extracts of statements were furnished to the petitioner. Translated copy of the show cause notice shows that two witnesses gave certain statements , but what was stated by them is not at all mentioned in the show cause notice. They simply stated that they are knowing the petitioner very well. The show cause notice shows that their statements corroborated the activities of the petitioner. Neither it is disclosed what activities were highlighted by these witnesses nor it is disclosed as to what was the period during which these activities were noticed or felt or experienced by these two witnesses. Nothing could be made out from the so called recital of the statements of these witnesses shown in the show cause notice as to what they actually intended to convey to the externing authority. On such vague material, the petitioner was certainly denied his effective right of his defence controverting the statements of these witnesses and this itself has rendered the show cause notice invalid. If the show cause notice is invalid, the subsequent action upon such show cause notice will also be rendered invalid.

The next vagueness and invalidity of the show cause notice is that in the opening portion, general allegations have been made and the period during which these activities were committed by the petitioner have not been disclosed. Merely by mentioning that these activities were confined to Veraval, it cannot be said that the exact area of operation of the petitioner was mentioned in the show cause notice. This is another ground rendering the show cause notice invalid.

Another ground invalidating the show cause notice and the impugned orders is non-application of mind by the externing authority as well as by the appellate authority ,to the material on record. If vague statements of two confidential witnesses were shown in the show cause notice, it can be said that subjective satisfaction of the externing authority was based on non-application of mind. Unless the entire statements were taken into consideration and it was further taken into consideration that after 1997 when the last criminal case was registered against him and between the date of issuance of notice on 23.6.1998, the petitioner indulged in identical activities, no order of externment can be passed nor show cause notice can be issued. The statements of two confidential witnesses being vague, it cannot be said that these witnesses stated about the activities of the petitioner in between the year 1997 and the date of issuance of the show cause notice. Only two cases were registered in the year 1995 against the petitioner and one in the year 1997. No case registered in the year 1996 is disclosed in the show cause notice.Thus, without application of mind to this aspect of the case, the externing authority issued show cause notice and also passed the impugned order which can hardly be sustained. Consequently, the order of the appellate authority confirming such order also cannot be sustained.

Non-application of mind to the material on record is further exhibited by the fact that the externing authority has mentioned that the petitioner committed offences punishable under Chapters 16 and 17 of the IPC. The three offences shown in the show cause notice are not under the sections covered by Chapter 17.Thus, mention of Chapter 17 of the IPC in the impugned order is mechanical and shows non-application of mind to the material on record. This has also rendered the impugned order invalid . An attempt has been made to show in para 3 (d) of the counter-affidavit that subsequently, the petitioner committed offences punishable under Chapter 17

of the IPC. But it is again not disclosed as to when these offences were committed nor it can be inferred from the vague statements of two confidential witnesses that these offences were committed in between the year 1997 and the date of issuance of the show cause notice

Another infirmity in the orders of externing authority as well as the appellate authority is that statements of five witnesses examined by the petitioner and 21 certificates tendered by him showing his good character were not taken into consideration by the said authorities. If defence evidence was given, the externing authority as well as the appellate authority were bound to consider the same. These authorities would be justified in not believing the defence evidence but for that, reasons should have been given. Subjective satisfaction was over after the show cause notice was issued and if the petitioner tendered defence evidence, the quasi-judicial authorities were bound to consider the same objectivity and not subjectivity.

The externing authority has simply mentioned that he had considered five witnesses on behalf of the petitioner and 21 certificates regarding good character and observed that it does not appear that the submission is proper. He should have given reasons why defence witnesses were not reliable and why the certificates were disbelieved. Defence evidence was thus not properly discussed noe sufficient reason for its rejection was given by the externing authority. The appellate authority also did not consider this aspect of the case and confirmed the externment order mechanically which renders both the orders invalid.

There is no merit in the contention that alternative lesser drastic remedy was not considered by the externing authority. Preventive action in the chapter case under sections 107 and 116 (3) of the Cr.P.C. was taken in the year 1991 vide chapter case No. 72/91 and order was passed against the petitioner. Thus, it cannot be said that lesser drastic remedy was not considered by the externing authority.

The last contention has been that no cogent reason has been given for externing the petitioner from the adjoining districts. This argument has also force and substance. The externing authority is justified in passing the externment order from contiguous districts but while doing so, he has to place reliance upon some material on record that the activities of the petitioner are also extending in adjoining districts more

specifically when he has been branded to be a member of criminal gang. There is nothing on record to show that the petitioner or his gang has any headquarters in the adjoining districts. Consequently, on the strength of reasoning that because fast means of conveyance are available , the petitioner can operate from the adjoining districts is nothing but mere surmise and conjecture and on such surmise and conjecture, the externment order from adjoining districts cannot be sustained.

For the reasons stated above, the show cause notice, the externment order and the order of the appellate authority cannot be sustained. The result,therefore, is that the petition succeeds and is hereby allowed. The show cause notice, order of externment and the order of the appellate authority are hereby quashed.
